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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/707,039	11/17/2003	Jeffrey W. Seale	38-21(15546)A	1038
27161 7590 12/26/2007 MONSANTO COMPANY 800 N. LINDBERGH BLVD. ATTENTION: GAIL P. WUELLNER, IP PARALEGAL, (E2NA) ST. LOUIS, MO 63167			EXAMINER ZHENG, LI	
			ART UNIT 1638	PAPER NUMBER
			MAIL DATE 12/26/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/707,039

Applicant(s)

SEALE ET AL.

Examiner

Li Zheng

Art Unit

1638

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 12 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 11-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 11-14 is/are allowed.
- 6) ☒ Claim(s) 16-20 is/are rejected.
- 7) ☒ Claim(s) 15 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. Applicant's amendments to claims 11, 15, 16, 19 and 20, as well as submission of a new Sequence Listing filed on 10/12/2007 are acknowledged. The Office also acknowledges Applicants' notification that in the previous response filed November 14, 2006, the Applicants failed to include claim 21 as a cancelled claim in the amendment.

Claims 11-20 are pending and examined on the merits.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. The objection to the specification is withdrawn in light of Applicants' amendments and submission of a new Sequence Listing.

4. The rejections of claims 12 and 20 under 35 U.S.C. 112, second paragraph, are withdrawn due to claim amendment.

***Claim Objections***

5. Claim 15 is objected due to the claim amendment. It is suggested to replace "and zucchini plant" with --or zucchini plant --, since the species are not presented as a Markush group.

***Claim Rejections - 35 USC § 112***

6. Claims 16-20 remain rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for antifungal activities of said antifungal polypeptides against *Fusarium* species and *Verticillium* species, does not reasonably provide enablement for any other plant pathogenic fungi including *Phytophthora infestans* and *Stagnospora nodorum*. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make/use the invention commensurate in scope with these claims, for the reasons of record stated in the Office action mailed April 12, 2007. Applicants traverse in the paper filed October 12, 2007. Applicants' arguments have been fully considered but were not found persuasive.

Applicants argue that not all plant pathogenic fungi are included in the Markush grouping of claim 19 and that the amendment to claim 16 results in the claim reciting only that the transgenic plant merely be more resistant to a fungal pathogen (response,

page 10, the 2<sup>nd</sup> paragraph, emphasis added). However, "a fungal pathogen" in claim 16 still reads on any fungal pathogen. Further, claim 16 still includes *Phytophthora infestans* and *Stagnospora nodorum* which are not enabled for the reason as discussed in previous office action filed April 12, 2007 (the paragraph bridging pages 4-5).

### **Summary**

Claims 16-20 are rejected.

Claims 11-14 are allowed.

Claim 15 is objected.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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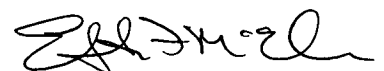
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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Li Zheng whose telephone number is 571-272-8031. The examiner can normally be reached on Monday through Friday 9:00 AM - 5:30 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anne Marie Grunberg can be reached on 571-272-0975. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
ELIZABETH MCELWAIN  
PRIMARY EXAMINER

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